

MEMORANDUM OF LAW

yymmdd

DATE: November 20, 1989

TO: Mayor Maureen O'Connor

FROM: City Attorney

SUBJECT: Potential Conflict of Interest Arising from
Ownership of Real Property/Item No. 31 on
Council Docket of November 20, 1989

Your memorandum of November 16, 1989 to City Attorney John Witt has been referred to me for response. You asked for our advice as to whether you have a conflict of interest in Item No. 31 on the Council docket of November 20th pertaining to the proposed construction of a 3,363 square foot single-family residence at 7975 St. Louis Terrace in La Jolla. A copy of the docket for November 20th regarding Item No. 31 is attached for your convenience (Attachment No. 1). It contains more facts about the subject property.

Your concern arises because you own property near the subject property. Specifically, you hold a trust deed on a parcel of real property located at 2182 Avenida de la Playa as shown on your Statement of Economic Interests (S.E.I.) for 1988.

BACKGROUND FACTS

In addition to the facts contained in your memorandum, we have obtained further relevant facts from Rudy Cervantes, Rules Committee Consultant, Frank Belock, Deputy Director, Development Services Division, City's Engineering and Development Department, and from Planning Report No. 89-466, dated August 30, 1989, to the Planning Commission pertaining to an appeal from the Planning Director's decision approving La Jolla Shores Planned District (LJSPD) Permit No. 89-0384, which would allow construction of "Casa Malk," a single-family residence at 7975 (listed incorrectly as 7957 on Planning Report) St. Louis Terrace.

According to the Planning Report, the applicant proposes to demolish an existing single-family, one-story residence and construct a new 3,363 square-foot, two-story residence on an

8,398 square-foot lot. The property is zoned SF (single-family) and is located within the La Jolla Shores Planned District. The subject property is surrounded by single-family development with a mixture of one and two-story residences and a mixture of architectural styles also zoned SF. Hereafter, we shall refer to the subject property as "Casa Malk."

At the Planning Commission meeting of October 21, 1989, the

Planning Commission upheld the Planning Director's decision, that is, the Commission approved the LJSPD permit to build the two-story residence.

Item 31 on the November 20th Council docket is a request for the City Council to allow an appeal from the decision of the Planning Commission. The request to hear an appeal was brought pursuant to San Diego Municipal Code (SDMC) section 103.0302.5 (copy enclosed as Attachment No. 2). If the Council votes to hear the appeal, the time has been set for hearing on the merits on December 5, 1989 at 10 a.m. There can be no vote on the merits of the Planning Commission's decision at the November 20th Council meeting.

Your property at 2182 Avenida de la Playa ("la Playa"), as shown on your S.E.I. for calendar year 1988, is valued at over one hundred thousand (\$100,000) dollars and earned rental income (mixed with loan payments and partner's capital contributions) of over ten thousand (\$10,000) dollars last year from Gustav Anders Associates. According to Mr. Cervantes, the property in the past has been operated as a restaurant; currently it is vacant. There are no immediate plans for development, however, it is for sale.

According to Mr. Belock, the la Playa property is located almost 2,000 feet from the Casa Malk property.

APPLICABLE LAW - POLITICAL REFORM ACT

The applicable law governing conflict of interest arising from ownership of real property was set forth in a Memorandum of Law dated September 8, 1989 to the Honorable Mayor and City Councilmembers regarding ownership of real property near a proposed Chinese mission. In lieu of repeating the applicable law here, we attach a copy of that memorandum (Attachment No. 3).

ANALYSIS

As a preliminary matter, it is necessary to determine whether the proposed Council action on November 20th relating to Casa Malk is the type of governmental decision that triggers a complete analysis of your potential conflict of economic interest as contemplated by the Political Reform Act ("Act"). The determination will depend on whether the action is ministerial or discretionary. In a memorandum dated October 5, 1989 to the Mayor's Chief of Staff, Benjamin Dillingham, copy attached (Attachment No. 4), we discussed the distinction between "discretionary" and "ministerial" governmental acts. The FPPC regulations recognize that ministerial, as opposed to discretionary, acts are not the type of acts that constitute making, or participating in making, a governmental decision within the meaning of Government Code section 87100. (2

California Code of Regulations 18700(d)(1)).

In the present case, the question is whether the Council's vote under SDMC section 103.0302.5 is discretionary or ministerial. The relevant language of this section reads as follows:

When a request to be heard on appeal is filed with the City Clerk it shall be placed on the Council docket for the limited purpose of determining whether the City Council will hear the appeal. The City Council will accept an appeal for hearing when any of the following situations are found to exist:

1. The appellant was denied the opportunity to make a full and complete presentation to the Planning Commission;
2. New evidence is now available that was not available at the time of the Planning Commission hearing; or
3. The Planning Commission decision was arbitrary because no evidence was presented to the Planning Commission that supports the decision.

If and only if the Council makes one of these three (3) findings may the Council vote to hear the appeal on the merits. The Council must make the decision based on the record of the Planning Commission proceedings and the written appeal itself.

The law does not dictate what result the Council must reach when considering these three (3) criteria. Hence, the decision to grant the appeal is discretionary within the meaning of the Political Reform Act. Because of this determination, we must proceed with the rest of the conflict of interest analysis.

In the present case, you clearly have an economic interest within the meaning of the Act because of your ownership of the la Playa property.

The real question presented by the current facts is whether that economic interest will be materially financially affected by the decision before the Council on November 20th.

Since the la Playa property is almost 2,000 feet from Casa Malk, FPPC regulation 18702.3 will apply to determine materiality. Under that regulation, it is necessary to determine whether there will be a ten thousand (\$10,000) dollar change in fair market value to the la Playa property as a result of the decision, or a change in rental value of one thousand (\$1,000) dollars or more for over a twelve (12) month period. The

determination is to be made in light of the following factors set forth in FPPC regulation 18702.3(d).

1. The proximity of the property which is the subject of the decision and the magnitude of the proposed project or change in use in relationship to the property in which the official has an interest;
2. Whether it is reasonably foreseeable that the decision will affect the development potential or income producing potential of the property;
3. In addition to the foregoing, in the case of residential property, whether it is reasonably foreseeable that the decision will result in a change to the character of the neighborhood including, but not limited to, effect on traffic, view, privacy, intensity of use, noise levels, air emissions, or similar traits of the neighborhood.

Since the determination of materiality is factual, we turned to City Manager John Lockwood for assistance on November 17th. Mr. Lockwood analyzed the facts under these guidelines and

determined that there would not be a \$10,000 change in fair market value of the la Playa property, nor would there be a change in rental value exceeding \$1,000 per 12 month period as a result of the vote of the Council on November 20th.

Mr. Lockwood found that the la Playa property is about five (5) to six (6) blocks from the proposed two-story residence. The current use of the Casa Malk property is a single-family residence and the use will not change. There might be some change in value of residential properties surrounding the Casa Malk property if the ultimate decision is to uphold the LJSPD permit for construction of the two-story residence because the surrounding houses might have impaired views. However, the Casa Malk project will not affect the view from the commercial building you own on Avenida de la Playa.

Because your property is a commercial property rather than a residential property, it was unnecessary for Mr. Lockwood to consider factor number three (3) in the above regulations. Mr. Lockwood found that if there is any change in value to the la Playa property as a result of the November 20th vote, it would not amount to \$10,000 change in fair market value or \$1,000 change in rental value of the property.

We conclude that there will not be a material financial effect on the la Playa property resulting from the November 20th decision to grant or deny an appeal on the merits. Therefore, there is no need to discuss whether the "public generally" exception applies.

In conclusion, we find that you are not disqualified from voting on November 20th to grant or deny a hearing on the appeal from the Planning Commission's decision to uphold the La Jolla Shores Planned District permit for Casa Malk.

JOHN W. WITT, City Attorney

By

Cristie C. McGuire

Deputy City Attorney

CCM:jrl:048(x043.2)

Attachments

cc Frank Belock

ML-89-108